

MUREBA D. SOUYRES
ANGELINA COUNTY DISTRICT CLERK
PO BOX 908
LUFKIN, TX 75902-0908



9214 8901 0661 5400 0163 3702 82

RETURN RECEIPT (ELECTRONIC)

CV-01103-21-06/KS

JEFF MARSHBURN, CPA
KENZIE'S OPTICS, INC.
809 WEST AVE
CARTERSVILLE, GA 30120-6133

CUT / FOLD HERE

Zone 5

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SERVICE

CITATION

CLERK OF THE COURT

Reba Squyres
District Clerk

P.O. Box 908
Lufkin, Texas 75902

ATTORNEY FOR PLAINTIFF

KEVIN M. FULLER
P.O. Box 12086
BEAUMONT TX 77726

THE STATE OF TEXAS

NOTICE TO DEFENDANT: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. In addition to filing a written answer with the clerk, you may be required to make initial disclosures to the other parties of this suit. These disclosures generally must be made no later than 30 days after you file your answer with the clerk. Find out more at Texaslawhelp.org."

TO: **Kenzie's Optics, Inc.**, Defendant

GREETINGS: You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10:00 o'clock a.m. of the Monday next after the expiration of 20 days after the date of service hereof, before the 159th Judicial District Court of Texas, at the Courthouse in Lufkin, Texas.

Said plaintiff's petition was filed on **June 04, 2021** at **4:42 O'CLOCK P.M.**

The file number of said suit being **CV-01103-21-06**.

The style of the case is:

BENJAMIN D. WINSTON, II
VS
AMAZON, INC. AND
KENZIE'S OPTICS, INC

A copy of plaintiff's petition accompanies this citation.

Issued on this the 7th day of June, 2021.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Lufkin, Texas, on this the 7th day of June, 2021.

Certified mail

Reba Squyres, District Clerk
Angelina County, Texas
P.O. Box 908
Lufkin, Texas 75902

By: Kimberly Scott, Deputy
Kimberly Scott, Deputy District Clerk

Cause: CV-01103-21-06

Executed when copy is delivered:

This is a true copy of the original citation with _____ was
 delivered to defendant _____, on the _____ day of _____,
 20_____.

_____, Officer

_____, County, Texas

By: _____, Deputy

ADDRESS FOR SERVICE:

Defendant: AGENT FOR SERVICE: JEFF MARSHBURN, CPA
 Kenzie's Optics, Inc.
 809 West Avenue
 Cartersville, GA 30120

OFFICER'S RETURN

Came to hand on the _____ day of _____, 20____, at _____, o'clock _____.m., and
 executed in _____ County, Texas by delivering to each of the within named defendants in
 person, a true copy of this Citation and _____ with the date of delivery
 endorsed thereon, together with the accompanying copy of the plaintiff's petition, at the following times and
 places, to-wit:

Name	Date/Time	Place, Course and Distance from Courthouse
_____	_____	_____

And not executed as to the defendant(s), _____

The diligence used in finding said defendant(s) being:

_____ and the cause or failure to execute this process is:

_____ and the information received as to the whereabouts of said defendant(s) being:

FEES:

Serving Petition and Copy \$ _____
 Total \$ _____

_____, Officer
 _____, County, Texas

By: _____, Deputy

Affiant

***Rule 107 Verification:** Subscribed and sworn to by the above named _____ before me this the _____
 day of _____, 20____, to certify which witness my hand and seal of office.

Person Administering Oath

Filed 6/4/2021 4:42 PM
Reba Squyres, District Clerk
Angelina County, Texas
By: Kimberly Scott,
Deputy Clerk

NO. CV-01103-21-06

BENJAMIN D. WINSTON, II	§	IN THE DISTRICT COURT OF
Plaintiff	§	
	§	
v.	§	ANGELINA COUNTY, TEXAS
	§	
AMAZON, INC. AND	§	
KENZIE'S OPTICS, INC	§	
Defendants	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BENJAMIN D. WINSTON, II, a/k/a BEAU WINSTON, Plaintiff,
and files this Plaintiff's Original Petition against Defendants herein and would show unto
the Court as follows:

**I.
DISCOVERY LEVEL**

1. Discovery is intended to be conducted under Level I of the Texas Rules of Civil Procedure 190.2 as Plaintiff seeks recovery of up to but not more than TWO-HUNDRED FIFTY THOUSAND AND NO/100 (\$250,000.00).

**II.
PARTIES**

2. Plaintiff, BENJAMIN D. WINSTON, II, a/k/a BEAU WINSTON (hereinafter called "BEAU WINSTON"), is an individual residing in Lufkin, Angelina County, Texas.

3. Defendant, AMAZON, INC., is a foreign corporation doing business in the State of Texas with a fulfillment distribution center in Haslet, Texas and has consented to jurisdiction in this state and may be served via certified mail upon its agent for service, Corporation Service Company d/b/a as CSC Lawyers Incorporating Service, at 211 E. 7th Street, Suite 620, Austin, Texas 78701.

4. Defendant, KENZIE'S OPTICS, INC., is a foreign corporation doing business in the State of Texas and may be served via certified mail upon its agent for service Jeff Marshburn, CPA, 809 West Avenue, Cartersville, Georgia, 30120.

III. VENUE

5. Venue is proper in Angelina County, Texas under Texas Civil Practices & Remedies Code §15.002(a)(1) and/or (4) and §15.017 and despite any forum selection clause in an adhesion contract calling for venue elsewhere, this suit is not based upon any contractual agreements but upon certain torts committed by Defendants and such forum selection clauses and choice of law clauses are inapplicable

IV. STATEMENT OF THE CASE

5. On November 4, 2020, Plaintiff purchased a Trijicon AccuPower 4.5-30x56 Long Range Rifle Scope with a 34mm tube from Defendant, Kenzie's Optics, Inc. (hereinafter "Kenzie's") through the retail website and fulfillment center owned and controlled by Defendant, Amazon, Inc. (hereafter "Amazon") The scope had a shipping weight of 5.45 pounds. Plaintiff paid \$1,921.44 for the purchase, including the product cost and applicable sales taxes.

6. Defendants caused to be shipped to Plaintiff another rifle scope of a far inferior quality and craftsmanship and weighing half as much as the product Plaintiff had ordered and for which he had already paid. Plaintiff immediately returned the item and brought it to the Defendants' attention that the item received was in fact a fake that had been put in a box that had been poorly decorated to look like it might have come from Kenzie's.

Actually, Amazon should have known better and never shipped the item to Plaintiff or anyone else to begin with.

7. When Amazon received the item in return, rather than refund the Plaintiff's money or send Plaintiff the correct product with an apology for his inconvenience, Defendants Kenzie and Amazon set out on a campaign to keep Plaintiff's funds and disparage the Plaintiff's reputation as a person that would keep the original item and then create a box and mail a cheap unbranded scope back with a false report of having not received what he had ordered and for which he had paid, all in a grand scheme to swindle Defendants out of less than \$2,000.00.

**V.
REQUEST FOR DECLARATORY RELIEF**

8. Plaintiff requests that the Court enter a judgment pursuant to Texas Civil Practices & Remedies Code Chapter 37 declaring that Plaintiff did not receive the item ordered and is not liable to the Defendants for payment for the item shipped by Defendants.

9. Plaintiff is entitled to recover his attorney's fees pursuant to Texas Civil Practices & Remedies Code §37.009.

**VI.
SLANDER, LIBEL, DEFAMATION AND SLANDER *PER SE***

10. False and inaccurate reports made to Plaintiff's credit card issuer as well as to any other various entities, such as credit reporting agencies by Defendants, as well as the relay of such false information by such entities constitute slander, libel and defamation and alleging an illegal act such statements constitute libel and slander *per se*. The law presumes certain categories of statements are defamatory (or slander) *per se*, including statements that (1) unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity or (2) that are falsehoods that injure one in his office, business, profession, or occupation. *Main v. Royall*, 348 S.W.3d 318, 390 (Tex. App.—Dallas 2011, no pet.). It is

up to Texas courts' interpretation of what statements are considered defamatory *per se* and Plaintiff alleges this Court should find the Defendant's statements defamatory *per se*. Specifically, Defendants published the following statement accusing Plaintiff of fraudulent, illegal and dishonest activity:

WHY NO REFUND IS DUE?

1) Item was delivered in undamaged condition & in given time frame. However, buyer returned a different item instead of an original item.

11. Defendants acting in concert also claimed they had shipped a 5.45 pound scope to Plaintiff and he had returned a different scope weighing a mere 2 pounds:

RETURNS INSPECTION:


As per our return inspection, customer has returned that does not match the original item weight is 5.450; it was shipped weighing 2.080, and has a received weight of 1.550.

From: November 20, 2020 5:01 PM PST	Order ID: 10000000000000000000	Product ID: null
		Bad Return Type: different item
		Received Item: UPMPC00000000000000000000
		Expected Item: 00000000000000000000000000000000
		Disposition: different item
		Disposition Remarks: item placed in device
		Additional Remarks: received and returned 3-inches rifle scope inside a dark stained box with tape markings pasted and taped on the outside. Along with customer's obscure comments on the outside, item weights do not match (original item weight is 5.450. It was shipped weighing 2.080, and has a received weight of 1.550). Customer has no prior purchase for a scope that looks like this. Attached images captured.
		Associate ID: 00000000000000000000000000000000

12. Defendants knew or should have known their reports were false and defamatory. Defendants had in their possession the shipping ticket from UPS by which they had shipped the counterfeit, cheap, knockoff scope to Plaintiff rather than the quality 5.45 pound scope he had purchased. Had Defendants given one iota of concern, they could have looked at their shipping ticket as well as that of the Plaintiff and seen they had actually shipped Plaintiff a 2.30 pound package rather than the 5.45 pound package they *claimed* to have shipped!

Shipment Details

Service

UPS Ground  (<https://www.ups.com/content/us/en/shipping/time/service/ground.html>)

Weight

2.30 LBS

Reference Number(s)

1011082269805002

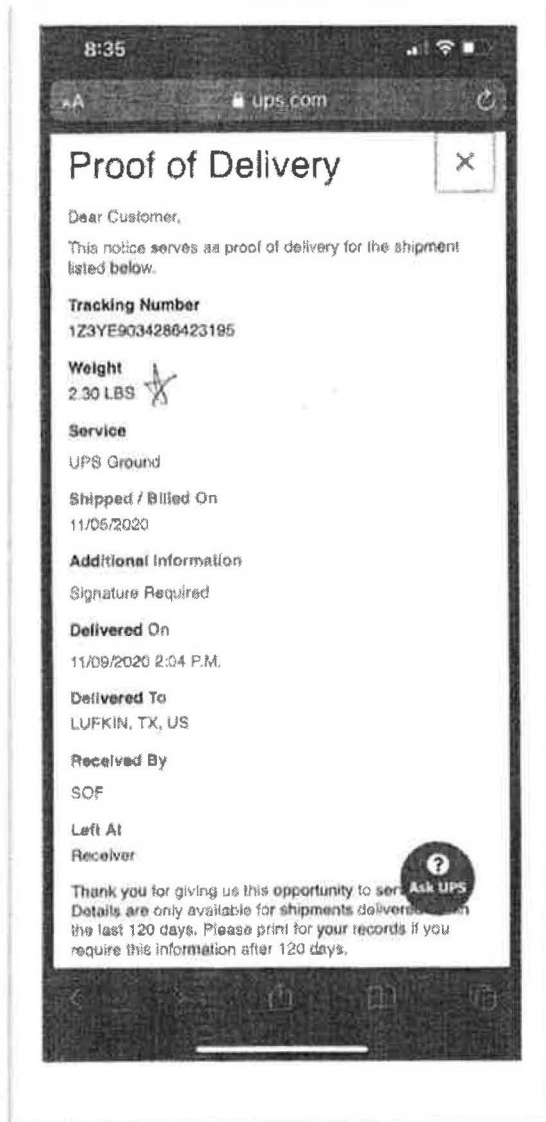
114-1595496-9629059

TFTTQQZH9

NA

UPS-TNWHI-N1155TNT7G UPST840485 UP

Defendants further could have easily confirmed the shipping weight of the product they had shipped to Plaintiff through the UPS tracking system:



13 Defendants acted with a conscious disregard for the truth of the assertions made against Plaintiff. As a result of such reports Plaintiff has suffered embarrassment, humiliation, and mental anguish. Plaintiff has also suffered monetary damages because of the amount of time and expense incurred in dealing with such false reports by Defendants.

14. In returning the fake, counterfeit item to Defendants, Plaintiff marked "Fake Bullshit" on the box in order to prevent Defendants from simply returning the item to stock and pawning it off again as a quality scope to an unsuspecting consumer. As further evidence of the lack of concern for truthfulness and honesty, in reporting to Plaintiff's credit card issuer, Defendants claimed that the item was returned "returned in unacceptable condition", i.e. a condition that kept Defendants from returning the item to stock and selling it to another victim. Amazon further made this report to Kenzie's, which relayed the information to Plaintiff:

From: Jessica Story <jessica@kenziesoptics.com>
Date: January 20, 2021 at 6:09:30 PM CST
To: Beau Winston <beauwinston@gmail.com>
Subject: Re: Counterfeit Amazon Sale - Benjamin D Winston II

Mr. Winston,

As previously stated on 3 occasions now, your order was fulfilled by Amazon. Your own actions in the item being sent back with profanity is why Amazon has not refunded you, as it is their typical policy to immediately refund the customer if the customer has done no wrongdoing.

In actuality, one employee of Defendants had noted the returned item was in a "frankensteined" box with paper manufacturer labels taped on it and that it did not fit any description of the scope ordered by Plaintiff and had the item destroyed.

Friday, November 20, 2020 8:01 AM (PST) Package Id: null
Bad Return Type: differentUnit
Received Item: LPNPM289616147
Expected ASIN: B07DKQL2Z7
Disposition: destroyItem
Disposition Remarks: Item placed in destroy
Associate Remarks: received and unbranded 3-9x40EG rifle scope inside a frankensteined box with Trijicon markings pasted and taped on the outside, along with customer's obscene commentary on the outside. Item weights do not match (original item weight is 5.450; it was shipped weighing 2.060, and has a received weight of 1.550). Customer has no prior purchase for a scope that looks like this. #RedPhone images captured
Associate Id: blehnhar

15. Plaintiff seeks judgment up to the amount of \$50,000 for libel, slander and defamation damages.

VII. CONVERSION

16. Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner's rights. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971); *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 758-59 (Tex. App.-Dallas 2008, no pet.). In this instance Defendant, Amazon has taken and retained possession of both the cheap counterfeit product shipped to Plaintiff as well as Plaintiff's funds paid for the purchase of the quality item, \$1,921.44. Amazon is liable for the cost of the item it has retained, for which they had charged \$1,921.44 or for the return of \$1,921.44 paid for such item.

VIII. PERMANENT INJUNCTION

17. Defendant should be ordered to cause to be remove all reports of the defamatory dispute from the records related to Plaintiff with Plaintiff's credit card provider as well as any credit reporting agencies or other entities to which Defendants may have made a similar defamatory report.

18. Defendant should be permanently enjoined from making further reports of the defamatory dispute upon the Plaintiff's credit card provider as well as with any and all credit reporting agencies.

19. Plaintiff asks the Court to set their request for permanent injunction for a full trial on the merits and, after the trial, issue a permanent injunction against Defendants.

20. Plaintiff also requests Defendants be enjoined from retaliating against Plaintiff by barring Plaintiff from any other or further purchases through Amazon as this particular dispute is solely the fault of Defendants. Defendants have already threatened such action if they were unable to retain the proceeds paid by Plaintiff regardless of the item they provided to him:

From: cb-info@amazon.com
Date: January 21, 2021 at 12:05:18 PM CST
To: beauwinston@gmail.com
Subject: Re: Counterfeit purchase on Amazon - BD Winston Additional photos
Reply-To: cb-info+A3KFMNH3JJ6ZTN@amazon.com

Hello,

Your card issuer has repaid us for this order. Therefore, we no longer need to recharge you for this order. Please contact the credit card issuer for more information.

If we closed your account due to this dispute, we have now reinstated it. You should be able to sign in and place orders as normal.

We appreciate your cooperation in resolving this matter and apologize for any inconvenience during this process.

Sincerely,

Ishani

Account Specialist

Amazon.com | Amazon Disputes Team

IX. ATTORNEY FEES

21. Plaintiff has pleaded causes of action entitling Plaintiff to recover attorney fees. Plaintiff prays for reasonable and necessary attorney fees up to \$20,000.00.

**X.
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for relief against Defendant as follows:

1. That at the conclusion of that final hearing, the Court enter a judgment pursuant to Texas Civil Practices & Remedies Code Chapter 35 declaring that Plaintiff did not receive the item ordered and is not liable to the Defendants for payment for the item shipped by Defendants.
2. That the Court award Plaintiff damages against Defendant for slander, libel, defamation and injury to her credit reputation in the amount of \$50,000;
3. That the Court award Plaintiffs attorney's fees in the amount of \$20,000;
4. That Defendants be permanently enjoined from making further reports regarding the disputed transaction upon the credit record of Plaintiff with any and all credit reporting agencies;
5. That Defendant be permanently enjoined from retaliating against Plaintiff for pursuing recovery of the damages caused by Defendants' conduct.
6. That Amazon is liable for the cost of the item it has retained, for which they had charged \$1,921.44 or for the return of \$1,921.44 paid for such item.
7. That Plaintiff be awarded pre- and post-judgment interest and costs of suit incurred herein.

8. That Plaintiff be awarded the TOTAL SUM of \$71,921.44 and such other and further legal and equitable relief as the Court may deem proper.

Respectfully submitted,

LAW OFFICE OF KEVIN M. FULLER
P.O. Box 12086
Beaumont, Texas 77726
(409) 835-2700 phone
(409) 835-2757 fax
Email: kfuller@kevinmfullerlawfirm.com

By: /s/ Kevin M. Fuller

KEVIN M. FULLER
TBA # 07521490